IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~238~~ 9

UNITED STATES OF AMERICA,
Appellant

v.

SEALY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

JOHN T. CHADWELL
RICHARD W. MCLAREN
RICHARD S. RHODES
DAVID L. AUFDERSTRASSE
Attorneys for Sealy, Inc.

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago 3, Illinois

JOSEPH F. HAAS
HAAS, HOLLAND, FREEMAN,
LEVISON & GIBERT
1116 First National Bank Bldg.
Atlanta 3, Georgia
Of Counsel

August 1, 1965

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 238

UNITED STATES OF AMERICA,
Appellant

v.

SEALY, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, respondent, Sealy, Inc., moves that the judgment of the district court be affirmed.

STATEMENT OF THE CASE

This is a direct appeal from a final judgment of the district court in a civil antitrust case brought by the government. The complaint charged that Sealy, Inc., ("Sealy") and its licensees conspired to divide marketing territories for "Sealy products,"[1] and to fix uniform sug-

---

[1] "Sealy products" are defined in para. IV(E) of the Final Judgment entered December 30, 1964 to mean "bedding manufactured by Sealy licensees under Sealy's patents and secret methods, processes or specifications and sold under the Sealy brand-name and Sealy registered trademark" (App. B. Jurisdictional Statement, p. 114a). (Page references hereinafter to the district court's Findings of Fact, Conclusions of Law and Judgment are to Appendices A and B of the Jurisdictional Statement ("J.S.").)

gested retail prices and induce retailers to adhere to such suggested retail prices for Sealy products, in violation of Section 1 of the Sherman Act (Fdg. 3, pp. 1a-2a).

As the district court found, "[t]he definitions of 'Sealy products' in both the complaint and answer exclude private label bedding, and there is no allegation that any licensee was restrained in any way in his manufacture or sale of products bearing his own label" (Fdg. 4, p. 2a). Accordingly, this case does not involve allegations of conspiracy vis-a-vis the "general market" for bedding, nor even alleged conspiracy affecting all bedding manufactured by Sealy licensees; rather, the issue is confined to alleged conspiracy with respect to these licensees' sales of bedding under Sealy's name or trademarks.

At the close of the government's evidence, the district court ruled that there was a failure of proof of the alleged conspiracy to divide markets and eliminate competition; Sealy accordingly put in no evidence on this issue and, at the close of the case, the court granted its renewed motion to dismiss this portion of the complaint under F.R.C.P. 41(b) (Fdgs. 8-10, 119; pp. 4a-5a, 51a; Final Judgment, para. II, p. 113a). It is from this judgment that the government appeals.[2]

Relying upon the theory of *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), and other *Cartel* cases (discussed hereinafter, pp. 17-20, *infra*), the government's fundamental contention below was that "Sealy, Inc. is no more than a facade," or a "front," which was "created and used [by the licensees] to camouflage their

---

[2] The district court upheld the retail price maintenance charge, issuing, according to the government, "an appropriate injunction" (J.S. 6). No appeal has been taken by either side from the pricing aspect of the judgment.

own collusive activities under a trademark umbrella."[3] The district court found no such conspiratorial scheme, but rather that the territorial restrictions of the Sealy licenses[4] were adopted for legitimate business reasons (Fdgs. 84, 119; pp. 33a, 51a); that they are "an essential inducement to prospective licensees—to get them to undertake the obligations of a Sealy license" (Fdg. 86, p. 36a); and that Sealy's "activities have been directed not toward market division among licensees but toward obtaining additional licensees and more intensive sales coverage" (Fdg. 119, p. 52a). Since the government relied entirely upon the *per se* unlawfulness of the alleged collusive scheme and made no claim of actual unreasonable restraint of trade, the court dismissed on the basis of failure of proof.

GROUNDS FOR AFFIRMANCE

The judgment below should be affirmed, and the government's contention that a *per se* rule governs the challenged licensing arrangement should be rejected, for the following reasons:

1. The district court found a failure of proof of the government's basic contention that Sealy is nothing but a "front" for a market-sharing conspiracy, to which a *per se* rule would be applicable. The court's findings of fact are unchallenged (*cf.* J.S. 7) and the judgment accordingly reflects no novel principle of law but rather an application

---

[3] Plaintiff's Reply and Answering Brief, p. 35, April 17, 1961; Plaintiff's Brief in Opposition to Defendant's Briefs, etc., pp. 12, 14-15, October 12, 1961. See also Government's Post-Trial Reply Brief, p. 8, July 2, 1964: Sealy is "nothing more than a 'corporate veil' under the egis of which various independent bedding manufacturers . . . allocate territories."

[4] Sealy's answer admitted that "Sealy licensees are licensed to manufacture and sell Sealy products in specified geographical areas" (Fdg. 4, p. 2a).

of the time-honored doctrine of ancillary restraints enunciated in *United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

2. The territorial covenants here challenged are "vertical restrictions" affecting only intra-brand competition. As this Court decided in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963), such restrictions have not been shown to fall in the category of restraints which are illegal *per se*. Although Sealy licensees, over the years, have collectively acquired controlling stock in Sealy, the government's evidence furnishes no basis for disregarding Sealy's separate corporate entity; it establishes no invidious design, no actual or potential threat to competition, and no reason whatsoever for invocation of a *per se* rule in this case.

3. Even if Sealy originally had been formed by the Sealy licensees as a merger or as a joint venture—for legitimate business purposes—its legality would be judged upon the basis of its effect upon competition, and not by a *per se* rule. *United States* v. *First Nat'l Bank & Trust Co.*, 376 U.S. 665, 671-72 (1964); *United States* v. *Penn-Olin Co.*, 378 U.S. 158, 170 (1964).

4. The rule for which appellant contends would render unlawful a host of "franchise" arrangements and would contravene the public interest in vigorous competition and the national policy to foster small business.

5. Summary affirmance of the judgment below is particularly appropriate in the instant case because (a) the territorial feature of the Sealy licenses has previously been reviewed by the Federal Trade Commission upon a complaint similar to that in this case, and not found unlawful (*Matter of Sealy, Inc.*, 45 F.T.C. 730 (1948)); and (b) the Justice Department's theory that all territorial restrictions are illegal *per se* was fully argued and rejected in the very recent *White Motor Co.* case, *supra*.

FACTUAL STATEMENT

1. The Defendant

Sealy is a business corporation whose principal activities are the licensing of approximately thirty relatively small bedding manufacturers to manufacture and sell Sealy products in different parts of the United States, and the furnishing of certain services to such licensees, in exchange for royalties.[5] In 1959, domestic sales of bedding by all Sealy licensees were $58.6 million, and Sealy's royalty income was $1.4 million.[6]

The bulk of Sealy's common stock is owned by licensees or persons having direct or indirect interests in licensee concerns; however, the amounts of stock held by these persons differ substantially. For example, the Memphis licensee for many years held shares sufficient in number that he could, with one or two other large stockholders, exercise voting control of Sealy; more recently, the Detroit, Kansas City and Chicago licensees have acquired major holdings, with the result that they, with one or more smaller holders, have had voting control (Fdgs. 68, 72, 75, pp. 28a-30a).[7]

Sealy's affairs are controlled by a Board of Directors elected at its annual meeting, where each share of Sealy

---

[5] Sealy also has a spring manufacturing subsidiary, Posture Products, Inc., and has licensees in Canada and Puerto Rico (GX 991G, 998, 1011, 1107 (p. 8-2); R. 2818-19).

[6] Annual sales by individual licensees ranged from $533,000 to $6.5 million, with three-fourths of the licensees having sales between $1 million and $3 million, and only five having sales over $3 million (Fdgs. 11-14, pp. 5a-6a).

[7] Sealy's stock was placed on a regular dividend basis in 1946 (Fdg. 67, p. 28a); it has increased in value from about $30 per share in 1936 to $352 per share in 1956 (Fdgs. 66, 76, pp. 27a-28a, 30a). Sealy's stock carries preemptive rights (GX 1008, 1011; R. 2328, 2345).

stock is entitled to one vote, and its day-to-day business is managed by an Executive Committee and the corporation's president (GX 981).[8] Under Sealy's by-laws, directors must be stockholders or nominees of stockholding licensees (see GX 981); however, stock ownership is neither required of nor limited to licensees.[9]

The evidence reveals the policy that the Board of Directors should "'consist of capable, energetic, ambitious and sound thinking men, *who have the interests of Sealy, Inc., at heart,* and that *it is to the interest of Sealy, Inc.,* to use the talents and abilities of as many of its [licensee] members as possible, therefore, the Board should be filled at all times with men of that caliber'" (Fdg. 45, p. 21a; emphasis in original).[10] Thus, Sealy stockholders "delegated most of the work to a few men who . . . spent much time working entirely in behalf of Sealy, Incorporated . . ." (GX 964; R. 2176).

Various types of evidence demonstrate that the affairs of Sealy have been managed and conducted in its own interests—not for the private interests of its individual stockholder-licensees. For example, the evidence shows that, over the years (1) Sealy made continuing efforts to attract new licensees in order to expand sales into unde-

---

[8] In modern times the Board normally has consisted of fourteen members; the Executive Committee has been composed of the president ex officio and five directors (GX 981, 991D).

[9] Appellant is in error (J.S. 3) in interpreting long superseded license contracts (GX 1012-1018; *cf.* GX 1076-1106; R. 2360) as requiring licensees to own stock, and in assuming that Sealy's by-laws limit membership on its Board to representatives of licensees. Earl Bergmann, full-time Sealy president, and a director from 1950-1960, for example, was a Sealy employee and stockholder—not a licensee or licensee representative (see GX 991F-H; R. 2815-19).

[10] Wherever italics appear in quotations in this brief, emphasis has been supplied unless otherwise indicated.

veloped areas (Fdgs. 26, 31, 38, 84, 86, 89, 95-109; pp. 11a, 14a, 17a-18a, 33a, 36a, 37a-38a, 40a-48a); (2) it required that all territories yield a fair minimum royalty return ("par"), or be surrendered to Sealy (Fdgs. 45, 79-82, 91; pp. 21a, 31a-32a, 38a); and (3) it terminated licenses where licensees were doing a poor job for Sealy (see, *e.g.*, Fdgs. 85, 114, 117; pp. 35a, 49a, 50a-51a).

From the earliest days, where a matter affected the licensee interest of a member of the Board of Directors or Executive Committee of Sealy, that person was excused from the meeting and the matter was decided by the remaining, disinterested members (Fdgs. 30, 113; pp. 14a, 49a; *cf.* Fdgs. 104, 117; pp. 43a, 51a).

Sealy has a headquarters staff of professional, technical and clerical personnel. It checks on compliance by the licensees with Sealy specifications (Fdg. 41, pp. 18a-19a). Valuable functions are performed by Sealy (for royalties) in the fields of advertising, engineering and research, styling, production, specifications, merchandising, cost and accounting, purchasing, and the like (Fdgs. 36-60, 119; pp. 16a-26a, 51a-52a).

Advertising and merchandising have become increasingly important in the bedding industry over the years since Simmons, the industry leader, introduced and began national advertising of its "Beautyrest" mattress in about 1926 (R. 2825-28, 2832; DX 17-19).[11] Sealy's annual advertising budget approached $1 million in 1956-1958 (DX 26-27; R. 2898, 2906).[12] Special merchandising programs

---

[11] Most major brand bedding manufacturers advertise their products nationally in media of mass circulation (R. 3017-19, 3077-81, 3093-96; DX 50-58B, R. 3113-14).

[12] It is impractical, if not impossible, for Sealy licensees to advertise individually in nationally distributed magazines (DX 26, R. 2898, 2911).

("promotions"), designed by Sealy and conducted twice a year, involve an over-all theme supported by national advertising, local advertising and dealer aids. Such promotions are an industry practice; they provide an important source of revenue, generating, for example, approximately half of the annual sales volume of Sealy licensees (R. 2843-45, 2855, 2861, 2892, 3030), and contributing substantially to Sealy's royalties.

2. Origin and Purpose of Sealy Licenses

Prior to 1920, Sealy products were manufactured by Sealy Mattress Company, a division of Sugar Land Industries, with factories at Sugar Land, Texas; Kansas City, and St. Louis, Missouri; and Oklahoma City, Oklahoma. In the early 1920's, Sugar Land licensed certain other concerns to manufacture and sell bedding under Sealy patents, trademarks and processes. In 1923, it began to sell its plants to local interests in the cities where they were located, executing license agreements permitting the purchasers to continue manufacturing and selling Sealy products in the areas previously served. By the end of 1923 some nineteen plants in different parts of the United States were licensed to manufacture and sell Sealy products in exchange for royalties (Fdgs. 16-18, pp. 6a-7a; Plaintiff's Pre-Trial Brief, p. 5, October 15, 1963).

Some time prior to 1925, Mr. E. E. Edwards, who had been manager of the Sealy mattress business for Sugar Land Industries, obtained an option from Sugar Land to purchase this business from it. He organized a new corporation (Sealy Corporation) for the purpose, with himself as president, and issued its notes, secured by a pledge of its stock, for the purchase price. He then entered into stock sale agreements with the Sealy licensees whereunder,

ultimately, three-fourths of the stock was to go to the Sealy licensees (whose licenses were renewed), and one-fourth to Edwards for his promoter's services. The contract which Edwards entered into with each licensee stated that the purpose was "'so that the name could be advertised and used for the benefit of all those manufacturers who hold license contracts, for the manufacture and sale of Sealy mattresses'" (Fdg. 20, p. 8a). Edwards also "stood to make a substantial profit from his 25% of the stock if the new corporation were successful, and . . . had little or no personal liability if it were not" (Fdg. 21, pp. 8a-9a).

Minutes of meetings of Edwards and the licensees during the years 1925-1932 reflect discussion of numerous matters of proper joint interest to them as stockholders and licensees, and no discussion of division of markets. The district court found that this evidence "negatives the existence in the origin of Sealy Corporation of a central conspiratorial purpose to divide the United States among competing mattress manufacturers" (Fdgs. 19-26, pp. 7a-11a).

In Executive Committee minutes relating to the "depression-caused financial difficulties" of Sealy Corporation and its licensees in December 1932, references are found to "'the primary purpose of the organization [being] to secure national advertising, and that mainly is what each factory secures from the Sealy Corporation'" and to "the desirability of signing enough licensees to operate Sealy factories in 47 cities[13] because . . . 'it was unanimously conceded that the mattress business is very nearly a local business, and it is practically impossible for a foreign factory to go into a local territory and secure any profitable business . . .'" (Fdg. 26, p. 11a).

---

[13] By this time, there remained only eight Sealy licensees (Fdg. 32, p. 15a).

Sealy Corporation defaulted on the purchase money notes given to Sugar Land and, in August 1933, promoter Edwards arranged, with assistance from the surviving licensees, to buy in the assets and organize a new company, Sealy, Inc., to continue its business (Fdgs. 32-35, pp. 15a-16a).

In 1936, Edwards left Sealy, selling his stock to the company (Fdg. 66, pp. 27a-28a). There is no dispute that, since that time, the bulk of Sealy stock has been owned (in widely varying amounts) by Sealy licensees, as previously described.

Neither is there any dispute, as the district court found, "that the Sealy licenses contain provisions assigning to each licensee an exclusive territory, in which Sealy agrees not to license any other person to manufacture or sell 'Sealy products,' and outside of which the licensee agrees not to manufacture or sell 'Sealy products'; it is also undisputed that . . . *there are no restrictions upon the areas where licensees can manufacture or sell their own-brand products* as long as they are not passed off as Sealy products. . . . A territorial provision like this has been in the Sealy licenses from the beginning . . ." (Fdg. 27, p. 12a).

From the early 1930's "and up to the latest times covered by plaintiff's evidence," the district court found, "the record shows that Sealy continued to seek new licensees to fill in parts of the country not adequately served by existing licensees.[14] It is obvious that an essential inducement to

[14] Although there was during the depression of the 1930's a plan whereby licensees might sub-license portions of their territories to others (see J.S. 5), the evidence shows that this plan was abandoned in 1936 and sub-manufacturers' contracts were eliminated (GX 931; R. 2052-55); thus " 'the franchising of territories is an exclusive right that is the property of Sealy, Incorporated,' and a licensee could not relicense territory to another plant" (Fdg. 87, p. 36a; see also Fdgs. 89, 92-93, 108, pp. 37a-39a, 46a-47a).

prospective licensees—to get them to undertake the obligations of a Sealy license—was the grant of exclusive rights in the territories in which Sealy asked them to manufacture, distribute, and pay royalties" (Fdg. 86, p. 36a).

Taking as an example the evidence with respect to Sealy's efforts over the years to obtain licensee coverage of the Southeastern part of the United States, the district court found that "Sealy obtained territory from old licensees, found new licensees, shifted territory among licensees, discontinued its contracts with some licensees, and finally found a satisfactory licensee for the Carolinas at Lexington, N.C., but never did, insofar as the record shows, settle on a suitable licensee for Georgia and Florida. This series of events," the court found, *"negatives the contention that Sealy is a front for competitors who created it and use it to divide the United States among themselves to avoid competition"* (Fdg. 85, pp. 34a-35a).[15]

To the district court, the evidence as a whole demonstrated that "there has never been a central conspiratorial purpose on the part of Sealy and its licensees to divide the United States into territories in which competitors would not compete. Their main purpose has been the proper exploitation of the Sealy name and trademarks . . . [and the territorial restrictions were] secondary, or ancillary, to the main purpose . . ." (Fdg. 84, p. 33a).

3. The Bedding Industry

Inter-brand competition is intense in the bedding industry, both at the manufacturer and the retailer level. There

[15] As a contracting party, Sealy could not disassociate itself from boundary disputes; it encouraged discussions and negotiations in order to achieve amicable settlements (Fdgs. 30, 109; pp. 13a-14a, 47a-48a), but the final decision rested with Sealy's president and Board of Directors (GX 753; R. 2375-76).

are at least 400 substantial bedding manufacturers in the United States (R. 2823-24).[16] A great many retail outlets —furniture and department stores and mail order houses, particularly—handle various brands of bedding. For example, the number of bedding outlets runs into the hundreds in Indianapolis and Memphis (R. 3177-80, 3201-04) and, although there are fewer outlets in Peoria, the bedding business is highly competitive (R. 3140-41). There is much price cutting and discounting by retailers from manufacturers' suggested retail prices, similar to the appliance and automobile businesses (R. 2949-50).

Appellant conceded that Sealy licensees have "many competitors" (R. 3060-62), and disclaimed any contentions regarding the vigor of inter-brand competition (R. 3057-59).[17]

---

[16] Competition among the fifteen or twenty mattress manufacturers in the Chicago area was described by a Simmons district sales manager as "very tough, very competitive," and in Cleveland and Denver as "vigorous" and "strong" (R. 3047, 3062-63).

[17] At pre-trial and throughout the trial, appellant took the position that this was a *per se* case and industry data was irrelevant. See, *e.g.*, R. 2525-39, and particularly R. 2534, where appellant's counsel averred that there is "plenty of [interbrand] competition" by Simmons, Englander and "many small local mattress" companies.

ARGUMENT

I. The Judgment of the District Court Embodies No Novel Principles of Law but Rather Reflects a Finding of Failure of Proof of a Conventional Charge of Conspiracy

A. Appellant Having Failed to Prove That the Challenged Arrangement Was Either Designed to, or Had the Effect of, Unreasonably Restraining Trade, the Complaint Was Properly Dismissed

At the trial, appellant offered many hundreds of exhibits (most of them multi-paged records from Sealy's files going back to 1925) in an effort to prove that the primary purpose of its trademark licensing arrangements was the elimination of competition among competing bedding manufacturers. This evidence proved, instead, these salient facts: (1) Sealy's "main purpose" was to exploit its name and trademarks through royalty-producing license agreements with bedding manufacturers "within their natural trading areas" (Fdg. 84, pp. 33a-34a; *cf.* Fdg. 26, p. 11a), and that "an essential inducement to prospective licensees —to get them to undertake the obligations of a Sealy license —was the grant of exclusive rights in the territories in which Sealy asked them to manufacture, distribute, and pay royalties" (Fdg. 86, p. 36a).[18] (2) The licensees' "primary purpose" was to finance national advertising in order to be better able to compete with the large national brand companies (see Fdgs. 20, 26, pp. 8a, 11a; *cf.* J.S. 9). (3) The licensing arrangement eliminated neither existing

---

[18] Even with this "inducement," Sealy had been unable over the years to "settle on a suitable licensee for Georgia and Florida" (Fdg. 85, p. 35a), and for long periods of time such presumably desirable territories as Philadelphia went unlicensed (see Fdgs. 93, 99, 104; pp. 39a, 41a, 43a).

nor potential competition among licensees since, to whatever extent they might be competitors in the sale of bedding under their own brands, that competition was not restricted by the Sealy licenses (see Fdgs. 3, 4, 5c, 27, pp. 1a, 2a, 3a, 12a).[19] Inter-brand competition—by small, local manufacturers with the industry giants—was greatly enhanced.[20]

Upon this record, the district court quite properly upheld the territorial provisions of the Sealy licenses (see Fdg. 84, p. 33a); they are "merely ancillary to the main purpose of a lawful contract," and valid both at common law and under the Sherman Act, in accordance with the rule of reason. *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271, 281-82 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899). This rule of law has stood over the years as a foundation stone for territorial covenants in a wide variety of agreements in a great many industries.[21]

---

[19] Nor was any licensee prevented from competing with his private brand against another licensee's Sealy brand.

[20] See R. 2894-95, 2898, 2911. See also testimony by licensees of Sealy and by other bedding manufacturer licensees in *Hearings on S. 1396 before a Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess. (1961). *Cf.* Sandura Co. v. FTC, 339 F.2d 847, 858 (6th Cir. 1964): "The only clear picture that emerges . . . is that closed territories made for the vigor and health of Sandura, increasing the competitive good that flows from *inter*brand competition without any showing of detriment in *intra*brand competition." (emphasis in original)

[21] See Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 66-67 (1873); Apollinaris Co. v. Scherer, 27 Fed. 18 (S.D.N.Y. 1886) (upholding territorial covenant in a trademark agreement); Fowle v. Park, 131 U.S. 88 (1889); Phillips v. Iola Portland Cement Co., 125 Fed. 593, 594-95 (8th Cir. 1903), *cert. denied,* 192 U.S. 606 (1904); Cincinnati Packet Co. v. Bay, 200 U.S. 179 (1906); Hanover Milling Co. v. Metcalf, 240 U.S. 403 (1916); Cole Motor Car Co. v. Hurst, 228 Fed. 280 (5th Cir. 1915); Coca Cola Bottling Co. v. Coca Cola Co., 269 Fed. 796, 814 (D.Del. 1920); Thoms v. Sutherland, 52 F.2d 592, 595 (3d Cir. 1931); United States v. E. I.

As recently restated in *United States* v. *Columbia Pictures Corp.*, 189 F.Supp. 153, 178 (S.D.N.Y. 1960): "The doctrine of ancillary restraints . . . permits, as reasonable, a restraint which (1) is reasonably necessary to the legitimate primary purpose of the arrangement, and of no broader scope than reasonably necessary; (2) does not unreasonably affect competition in the marketplace; and (3) is not imposed by a party or parties with monopoly power."

(1) *Sealy's territorial restrictions are necessary.* The territorial restrictions in Sealy's licenses are not a mere accommodation by Sealy to its licensees. Illustrative of the district court's finding that such a restriction is "an essential inducement to prospective licensees" is the following: the greater Philadelphia territory remained unlicensed for a long period of time (see note 18, *supra*); neither the New Jersey nor the Baltimore nor any other licensee found it practical to undertake additional license and royalty obligations and to make the local investment in time and money necessary to build up a business in Sealy products.

---

duPont de Nemours & Co., 118 F.Supp. 41, 219 (D.Del. 1953), *aff'd,* 351 U.S. 377 (1956); Foundry Services, Inc. v. Beneflux Corp., 110 F.Supp. 857, 861 (S.D.N.Y.), *rev'd,* 206 F.2d 214 (2d Cir. 1953); Wilbert W. Haase Co. v. Sultz, 43 T.M. Rep. 841 (W.D.N.Y. 1953); Schwing Motor Co. v. Hudson Sales Corp., 138 F.Supp. 899 (D.Md.), *aff'd,* 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957); Tri-Continental Financial Corp. v. Tropical Marine Enterprises, Inc., 265 F.2d 619, 625 (5th Cir. 1959); Reliable Volkswagen Sales & Service Co. v. World-Wide Automobile Corp., 182 F.Supp. 412, 427 (D.N.J. 1960); Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc., 274 F.2d 29 (7th Cir. 1959); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962); Engbrecht v. Dairy Queen Co., 203 F.Supp. 714 (D. Kan. 1962); Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964).

In 1951, Sealy's president brought in a new licensee to cover the area—Fisher Products Company, of Chester, Pa., a firm that previously had not even been in the mattress manufacturing business (see R. 2894-95; *cf.* Fdg. 104, p. 43a).[22] Naturally, making a large investment and putting forth substantial effort, this concern required assurance that once it had built up a business in Sealy products, licensees in adjoining areas would not *then* begin to sell into the area under the Sealy name in order to "skim the cream." By the same token, a continuing territorial restriction is necessary in order to induce licensees to continue to expend time and money in building the acceptance of Sealy products in their respective territories; they cannot logically be expected to do so without assurance that the fruits of their labor will not be appropriated by others.[22a]

(2) *Sealy's territorial restrictions are "of no broader scope than reasonably necessary," and do not unreasonably affect "marketplace" competition.* To whatever extent a licensee concern is able to sell its private brand products on their own merits in its own or any other areas, such sales are completely unaffected by the territorial provisions of the licenses (Fdg. 27, p. 12a). Moreover, the government concedes that there is "plenty" of inter-brand competition

---

[22] Speaking generally of recruitment of new licensees, E. H. Bergmann, former Sealy president, testified to a number of cases (including Fisher Products) "where we have brought in a licensee for a certain section of the country who probably was doing, maybe, $200 or $300 thousand volume, and after a matter of five years or ten years, he was up to a million or more" (R. 2894-95).

[22a] A similar requirement of territorial protection was found to be the distributors' condition for handling the line in Sandura Co. v. FTC, 339 F.2d 847, 853 (6th Cir. 1964). See also Note, ***Restricted Channels of Distribution under the Sherman Act,*** 75 Harv. L. Rev. 795, 811-13 (1962).

in the bedding industry (R. 2534). Thus, the territorial restraint in question is of the type which "promotes competition," not one which "may suppress or even destroy competition"; it does not affect the "general market." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238, 240 (1918); see also *White Motor Co.* v. *United States*, 372 U.S. at 261.

B. The Cartel Cases Relied Upon by Appellant Are Inapposite

Appellant does not challenge the district court's findings of legitimate "primary purpose," but contends that the court reached the wrong conclusions in applying the law. Thus, it argues that "the arrangements . . ., although formally vertical, *amount to* agreements between competitors to divide markets" (J.S. 7), that the "system challenged . . . is, *in effect*, a 'horizontal' division of territories illegal *per se*" under the authorities (J.S. 8), and, hence, that the district court's findings as to legitimate "primary purpose" are irrelevant (J.S. 9).

The cases relied upon by appellant (J.S. 7), holding that market division schemes are *per se* unlawful, are completely inapposite. In each of them was found a primary purpose to eliminate competition. For example, in *United States* v. *Timken Roller Bearing Co.*, 83 F.Supp. 284, 310, 312, 314 (N.D.Ohio 1949), *aff'd*, 341 U.S. 593 (1951), the district court found as a fact that the "trademark provisions of the challenged contracts were subsidiary and secondary to the *central purpose* of allocating trade territories." The challenged arrangements affected some 80% of all tapered roller bearings manufactured in the United States, Britain and France (83 F.Supp. at 288-89), and involved price fixing in joint territories, and collective activities to eliminate competition from outsiders, as well as exclusive sales

territories (83 F.Supp. at 318). This Court affirmed, noting that "the *dominant purpose* of the restrictive agreements . . . was to avoid all competition," and pointing out that "prior decisions plainly establish that agreements providing for an aggregation of trade restraints such as those existing in this case are illegal . . ." (341 U.S. at 597-98).[23]

The finding that the central purpose of the arrangement here was legitimate—not one of allocating trade territories—clearly distinguishes this case from *Timken.* A most important additional difference is that, in *Timken,* the territorial covenants prevented the co-conspirators from manufacturing, selling or dealing in bearings except under the "Timken" mark, which "provided a ready means of policing the division of territories . . . prevented British . . . and French Timken from building up good will in a different mark . . . [and] assured continuation of the territorial allocation, since those companies could termi-

---

[23] Other cases relied upon by appellant are of similar character: United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898), *aff'd,* 175 U.S. 211 (1899), involved an agreement among dominant manufacturers, the sole purpose and effect of which was to fix prices and divide territories; the only defense offered was that the prices fixed were reasonable. In United States v. National Lead Co., 63 F.Supp. 513, 523-24 (S.D.N.Y. 1945), *aff'd,* 332 U.S. 319 (1947), it was found that the primary purpose and effect of the arrangement under attack was division of markets for virtually 100% of the world's supply of titanium. United States v. Nationwide Trailer Rental System, Inc., 156 F.Supp. 800 (D.Kan. 1957), *aff'd,* 355 U.S. 10 (1957), also involved a price fixing and territory division scheme and has been cited for the proposition that "the rule of reason is inapplicable to agreements *made solely for the purpose of eliminating competition.*" (White Motor Co. v. United States, 372 U.S. at 281 (dissenting opinion); see also United States v. Penn-Olin Co., 378 U.S. 158, 178 (dissenting opinion), describing the *Nationwide Trailer Rental* case as involving an "agreement establishing exclusive territories for each member of an organization set up to regulate the one-way trailer rental industry. . . .")

nate only by accepting virtual destruction. . . ."[24] Sealy licensees have the right to, and in fact do, manufacture and sell under other brands, without restriction as to sales territory.[25]

Appellant might have cited numerous other *Cartel* cases in which elimination of competition was the primary purpose of the arrangement, and to which the doctrine of ancillary restraints, accordingly, had no application.[26] In

---

[24] Brief for the United States, pp. 53-54, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). See NEALE, THE ANTITRUST LAWS OF THE U.S.A. 316, n. 1 (1960): "The trouble arises . . . when the agreement requires the foreign firm to refrain from selling an unpatented product in the United States under any trade-mark." In Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 409 (5th Cir. 1962), the court similarly distinguished the *Timken* case, pointing out that "the primary purpose of the [Spring-Air] agreement was not to avoid the antitrust laws" and noting particularly that "Denison's private brand products were not affected in any material manner by the agreement."

[25] See p. 10, *supra*. Private brand sales by Sealy licensees within their licensed territories in 1959 aggregated $2,463,260 (GX 1107, p. 9-2) and, although the record does not show *quantities*, government counsel conceded that licensees also sell their private brand mattresses outside these territories (R. 2534).

[26] See, *e.g.*, United States v. Holophane Co., Inc., 119 F.Supp. 114, 119 (S.D.Ohio 1954), *aff'd*, 352 U.S. 903 (1956); United States v. General Electric Co., 80 F.Supp. 989, 1009 (S.D.N.Y. 1948) (*Carboloy* case); United States v. United States Alkali Export Ass'n, 86 F.Supp. 59, 71-74, 79, 80 (S.D.N.Y. 1949); United States v. General Electric Co., 82 F.Supp. 753, 845-48 (D.N.J. 1949) (*Lamps* case); United States v. Imperial Chemical Industries, 100 F.Supp. 504, 527-29, 557, 559 (S.D.N.Y. 1951); United States v. Bayer Co., Inc., 135 F.Supp. 65, 70-71 (S.D.N.Y. 1955): "dominant purpose was to divide the world market. . . . transfer of trademark rights were incidental to that major objective." For general discussions of the *Cartel* cases, see NEALE, *supra* note 24, at 302-20; BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 79-80, 120-22 (1958); FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS 132-35 (1958).

each instance, however, careful consideration was given by the courts to the nature and purpose of the arrangement, and it was only after finding that market division was a primary objective, and not merely incidental to a legitimate main undertaking, that the ancillary restraints doctrine and the rule of reason were held not to apply. Where there is no such overriding illegal purpose, as the Attorney General's Committee Report recognized, "valid trade-mark rights may provide a lawful main purpose to which reasonable restrictions on competition may be properly ancillary and therefore legal."[27]

C. Appellant Misconstrues This Court's Holding in the White Motor Case

Appellant's reliance (J.S. 6-8) upon *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), is misplaced for two reasons: first, it attempts to relate dicta in *White Motor* concerning "'horizontal' division of territories" to the *vertical* arrangement in the case at bar. Second, we submit, it completely misconstrues those dicta.

Although it is true that the Court "stated, without qualification, that '[i]f competitors agree to divide markets, they run afoul of the antitrust laws'" (J.S. 7), it is perfectly clear that the reference was to agreements whose primary purpose and effect was the elimination of competition, *i.e.,* as in the *Cartel* cases discussed above. This is not only a fair interpretation of the language used but the Court cited the *Timken* case immediately following the quoted statement (372 U.S. at 259).

Appellant is wrong in stating (J.S. 8): "*White Motor Co.* v. *United States,* 372 U.S. 253, 263, reaffirmed that '[h]orizontal territorial limitations * * * are naked restraints of

---

[27] Att'y Gen. Nat'l Comm. Antitrust Rep. 87 (1955).

trade.'" This is a truncated quotation. The Court's statement actually was: "Horizontal territorial limitations . . . are naked restraints of trade *with no purpose except stifling of competition*" (372 U.S. at 263). Again, there can be no doubt that the Court was referring to the principle of the *Cartel* cases: territorial arrangements *whose primary purpose is to eliminate competition* are naked restraints of trade and unreasonable *per se*.[28] It is only by deleting from the Court's definition of "horizontal territorial limitations" the "purpose" qualification that appellant is able to argue that "any proffered legitimate purposes, such as collective advertising, are immaterial" (J.S. 10).[29]

---

[28] See Brewster, *op. cit. supra* note 26, at 79: "Agreements among otherwise unaffiliated competitors which, by their terms, are designed solely to fix price, determine output, allocate customers, or coerce competitors are generally conceded to be 'naked' restraints of trade which are unlawful per se. . . ."

[29] Appellant's citation of Mr. Justice Brennan's concurring opinion in *White Motor* (J.S. 8) is similarly lacking in merit. Justice Brennan stated that "[i]f it were clear that the territorial restrictions . . . had been induced solely or even primarily by appellant's dealers and distributors, it would make no difference . . . that [they] . . . were formally imposed by the manufacturer rather than through inter-dealer agreement" (372 U.S. at 267, citing Interstate Circuit, Inc. v. United States, 306 U.S. 208, and United States v. Masonite Corp., 316 U.S. 265, 275-76). This statement, considered with the cases cited, simply reiterates the well-established principle that neither the form of an unlawful combination, nor the fact that there was an indirect meeting of minds, will save an unlawful combination. See Timken Roller Bearing Co. v. United States, 341 U. S. 593 (1951) (an agreement among competitors designed to suppress competition cannot be "justified by labeling the project a 'joint venture'" [*id.* at 598], and "[a] trademark cannot be legally used as a device for Sherman Act violation" [*id.* at 599]). See also Sandura Co. v. FTC, 339 F.2d 847, 857 (6th Cir. 1964) (a closed territory plan "conceived by the distributors and policed by Sandura . . . . would, of course, be invalid as a horizontal agreement not to compete" [citing *Interstate Circuit* and *Timken*]).

Placing complete reliance upon its misapprehension of *White Motor,* the government makes no effort to distinguish the many decisions which have held territorial restrictions consistent with antitrust policy (see note 21, *supra*), and it does not even assert that the restrictions here challenged have an adverse effect upon competition. Not even the standard governing "tying" arrangements, the use of which, it has been held, "can rarely be harmonized with the strictures of the antitrust laws . . ." (*Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330 (1962)) is so rigid as the *per se* rule here urged. As the Court pointed out in *White Motor,* tying arrangements "may fall in [the *per se*] category, though not necessarily so," noting the "importance of the nature of the tying arrangement in its factual setting" (372 U.S. at 262-63).

If the Court's *White Motor* decision meant what appellant now contends, *i.e.*, that all territorial restraints having any "horizontal" aspect are, regardless of motive or effect, *per se* illegal, then that decision, without discussion or express statement of intention to do so, substantially demolished the deep-rooted ancillary restraints doctrine. No longer would the seller of a business, or a capital asset, or the owner of a trademark and secret process, be free to follow the long-established and customary practice of selling, leasing or licensing rights to another and agreeing not to compete with him.[30] And such territorial franchises as those granted to local dealers or manufacturers by a great many business concerns—in such varied industries as hearing aids, soft drinks and soft ice cream, swimming pool equipment, drive-in restaurants, rug cleaning, water

[30] *Cf.* cases and authorities cited at note 21, *supra;* see also 6A Corbin, Contracts §§ 1389, 1409 (1962); 5 Williston, Contracts § 1642 (rev. ed. 1937); Restatement, Contracts §§ 515-16 (1932); Oppenheim, Federal Antitrust Laws 1-6 (2d ed. 1959).

softening and burial vaults[31]—would be outlawed under the rule for which appellant contends, carried to its logical conclusion under the *Interstate Circuit* and *Masonite* cases (that is, a "conspiracy" would be established by virtue of the fact that each dealer accepted a restricted franchise with the knowledge and understanding that each other dealer was accepting a similarly restricted franchise).

This was the rule for which appellant argued in the *White Motor* case. Thus, it contended:

> "In stating that an agreement for a 'division of markets' was unlawful per se, the Court, in Northern Pacific, drew no distinction between vertical and horizontal agreements. The Court has long held that vertical and horizontal price fixing agreements are equally unlawful per se. We submit that agreements between a manufacturer and his distributors providing for a division of markets among the distributors are as unlawful per se as a division among the distributors themselves. There is no reason for engrafting an exception upon the general rule outlawing this category of restraint of trade."[32]

[31] See Lewis & Hancock, The Franchise System of Distribution 22-23 (prepared by U. Minn. for Small Business Administration, 1963); see also cases cited, note 21, *supra*, and Hearings, *supra* note 20, pp. 90-100, 102-103, 145-73.

[32] Brief for the United States, p. 12, White Motor Co. v. United States, 372 U.S. 253 (1963). The argument was made again (*id.* at 17-18 and 21) based upon the statement in Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 408, that a manufacturer "can fare no better with its plan of identical contracts than could the dealers themselves. . . ." Appellant also argued (*id.* at 9): ". . . even if there were a relevant theoretical distinction between market divisions voluntarily undertaken by manufacturers and those instigated by dealers, any such distinction would not be administerable in practice because of the interrelated motivations of the dealers and the manufacturer which go into any decision by a manufacturer to divide its purchasers' markets."

In deciding *White Motor*, this Court did not accept this argument, but stated (372 U.S. at 263): "We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . . and therefore should be classified as *per se* violations of the Sherman Act."

In summary, therefore, although appellant purports to rely upon *White Motor*, this appeal in fact represents a transparent effort to reargue and overrule its basic holding—to draw "no distinction between [Sealy's] vertical agreements and horizontal [cartel] agreements" but to presume that they have a "pernicious effect on competition and lack . . . any redeeming virtue," and that evidence to the contrary is irrelevant. Appellant's attempt to use this appeal as a vehicle to obtain reargument of its doctrinaire theories on territorialization should be summarily rejected.

II. Application of a Per Se Rule in the Case at Bar Is Unwarranted

A. The Restraints Here Challenged Do Not Fall in the Per Se Illegal Category Established by the Decided Cases

Activities held *per se* unlawful under the Sherman Act are those as to which ". . . experience and analysis have established the utter lack of justification to excuse [their] . . . threat to competition." *White Motor Co.* v. *United States*, 372 U.S. 253, 265 (concurring opinion); see also majority opinion, *id.* at 262, and *Northern Pac. R. R.* v. *United States*, 356 U.S. 1, 5 (1958).[33] The precise holding

---

[33] See also Loevinger, *The Rule of Reason in Antitrust Law*, 50 Va.L.Rev. 23, 32-35 (1964); Van Cise, *The Future of Per Se in Antitrust Law*, 50 Va.L.Rev. 1165, 1171-74 (1964).

of the *White Motor* case, we believe, is that, to date, the courts "know too little of the actual impact" and not "enough of the economic and business stuff out of which [vertical territorial restrictions] emerge" to hold them unlawful *per se* (372 U.S. at 261, 263, 264).[34]

The restrictions here challenged are vertical restrictions and, there being no proof that Sealy is a "mere instrumentality" of the licensees with no separate existence of its own[35]—or that it was formed for the purpose of circumventing the antitrust laws[36]—plaintiff has shown no reason whatsoever why the Court should depart from its holding in *White Motor*.

---

[34] *Cf.* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360-61 (1933): "The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. . . . The familiar illustrations of partnerships, and enterprises fairly integrated in the interest of the promotion of commerce, at once occur. The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions." It is noteworthy that the Court went on to compare the arrangement in *Appalachian Coals* to a merger—to which no *per se* rule applied (*id.* at 377)—much as the Court did in *White Motor* (see 372 U.S. at 263-64).

[35] See 1 Fletcher, Cyc. Corporations § 25 (1963); Cannon Mfg. Co. v. Cudahy Co., 267 U.S. 333 (1925); Press Co. v. NLRB, 118 F.2d 937, 945-46 (D.C. Cir. 1940), *cert. denied*, 313 U.S. 595 (1941); Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Nuarc Co. v. FTC, 316 F.2d 576 (7th Cir. 1963); Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 160-61 (7th Cir. 1963); Nichols & Co. v. Secretary of Agriculture, 131 F.2d 651 (1st Cir. 1942).

[36] See note 37, *infra*.

B. The Facts Do Not Warrant Extension of the Per Se Rule to the Territorial Restrictions Here Challenged

Appellant claims neither illicit purpose nor "pernicious" competitive effect; it contends only (J.S. 11) that the decision below "permits an arrangement whereby competitive manufacturers may divide territories (and thus avoid a *per se* restriction of the antitrust laws) by taking restrictive licenses from a trademark holder whom they collectively control"; this is pure assertion, unsupported by law, evidence, or common sense. Competitors are prohibited from entering into a combination having any such primary purpose by the rule of the *Cartel* cases[37] and the *Interstate Circuit* and *Masonite* cases, discussed above, and any such combination, regardless of purpose, would be unlawful under the ancillary restraints doctrine if it in fact resulted in an unreasonable restraint of trade.[38] The decision of the district court in the case at bar in no way impinges upon these principles.

The rule of reason, the Court pointed out in *United States* v. *American Tobacco Co.,* 221 U.S. 106, 181 (1911), extends the reach of the law to ". . . every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts [are] clothed . . . . [T]here [is] no possibility of frustrating that policy by resorting to any disguise or subterfuge of form . . . ." At the same time, it was noted (*id.* at 180), the rule of reason "prevent[s] that [Sherman] act from destroying all liberty of contract and all substantial right to trade, and thus causing the act

---

[37] In particular, United States v. National Lead Co., 332 U.S. 319, 343 (1947), United States v. New Wrinkle, Inc., 342 U.S. 371, 374 (1952), and United States v. American Tobacco Co., 221 U.S. 106, 171-72 (1911), hold that a jointly owned corporation may not be used as a vehicle for effectuating unreasonable restraints of trade.

[38] See p. 15, *supra.*

to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve. . . ."

Thus, rather than implementing the Sherman Act, the mechanical rule the government urges would infringe some of the very liberties and rights the act was designed to protect.

III. Even if Sealy Originally Had Been Formed by Its Licensees as a Joint Venture, or as a Complete Merger of Their Businesses, Its Legality Would Not Be Judged by a Per Se Rule

The government's basic position on this appeal is that the collective stock ownership and control of Sealy by its licensees renders the territorial provisions of its licenses *per se* unlawful (J.S. 2, 7, 8, 9). But, assuming the legitimate primary purposes found by the district court,[39] even if its small business licensees had organized Sealy initially as a jointly owned venture, or as a consolidation of their businesses, the legality thereof under Section 1 of the Sherman Act would not be tested by a *per se* rule. See *United States* v. *First National Bank & Trust Co. of Lexington,* 376 U.S. 665, 671-72 (1964). In fact, such a harsh rule would not even test its legality under the Clayton Act.

Section 7 of the Clayton Act,[40] it has been held, applies to the formation of a joint venture concern by two or more corporations, the same as to a merger. *United States* v. *Penn-Olin Co.,* 378 U.S. 158, 170 (1964). The test of legality

---

[39] Appellant does not contest the court's "entirely legitimate business purposes" findings (Fdg. 119, p. 51a; see also p. 17, *supra*), presumably recognizing that this Court will not try issues of intent *de novo.* United States v. Yellow Cab Co., 338 U.S. 338 (1949).

[40] 38 Stat. 731, as amended, 15 U.S.C. § 18 (1958).

of a joint venture,[41] as set forth in *Penn-Olin*, is "the probability of a substantial lessening of competition"—not one of *per se* illegality—taking into account such criteria as

> "the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reason and necessities for its existence. . ."

and so on (378 U.S. at 177).[42]

By the same token, if Sealy's licensees had gone so far as to merge their separate companies into a single concern (thus permanently eliminating competition among themselves—on both private and Sealy brands), and were charged with monopolizing trade in "Sealy products" in violation of Section 2 of the Sherman Act, a *per se* rule would not govern. Instead, the power of the resulting corporation in the relevant market and line of commerce—taking into account the "reasonably interchangeable" products of competitors—would be carefully weighed and measured. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956) (*Cellophane* case).

---

[41] Assuming the absence of "specific intent to use [the joint venture] as a vehicle to eliminate competition." United States v. Penn-Olin Co., 378 U.S. at 176. See also United States v. Timken Roller Bearing Co., 83 F.Supp. at 312: "If a joint venture . . . is formed for the purpose of a lawful business enterprise and restraints result from the right to protect established business interests no violation of law occurs."

[42] Joint ventures, as this Court observed in *Penn-Olin*, are of ancient vintage and "[t]heir economic significance has grown tremendously in the last score of years . . ." (378 U.S. at 169).

Clearly, the *contractual* arrangement in the case at bar, found by the district court to be legitimately motivated and which enables small and new businesses to compete effectively against large established ones, without merging and losing their independence, should be judged by no less flexible and realistic standard than the *structural* arrangements just described.

IV. The Rule for Which Appellant Contends Would Contravene the Public Interest in Vigorous Competition and the Fostering of Small Business

A *per se* rule here, compelling intra-brand competition among small licensee concerns while leaving large integrated manufacturers free to concentrate their competitive weapons on inter-brand competition, could lead only to a weakening of the independents, strengthening of the integrated concerns, and increased industry concentration. Proper antitrust enforcement demands no such result. As a recent head of the Antitrust Division stated:

> "[T]he basic approach of antitrust is toward the promotion of free competition in the market rather than toward the preservation of any one group. This does not mean that antitrust need cramp that cooperation between small businessmen which generates effective competition with larger rivals but which at the same time maintains maximum independence of individual business decision. Trade association activities, joint ventures, research and technology pools, etc.—when grounded on legitimate business purposes—have traditionally found approval under the 'rule of reason' approach of antitrust."[43]

The Court of Appeals for the Fifth Circuit recently fol-

[43] Bicks, *The Enforcement Policies of the Department of Justice and the Small Businessman*, 16 A.B.A. Antitrust Section Rep. 54, 55-56 (1960).

lowed this rule of reason approach in the recent case of *Denison Mattress Factory* v. *Spring-Air Co.*, 308 F.2d 403 (1962). This case involved an antitrust challenge to territorial licensing arrangements (similar to those in the case at bar) of a company formed, and whose stock was jointly owned, by its licensees. Finding legitimate reasons for the arrangement and no improper purpose, the court refused to apply a *per se* rule, observing that "[a]n agreement which strengthens and promotes competition is not a violation of the law."[44]

Conceivably, one or more such licensee groups might provide the only effective competition for a dominant concern in a particular industry,[45] yet, under the *per se* rule for which the government here contends, its pro-competitive nature and practical business justification could not be

---

[44] 308 F.2d at 413. This decision was quoted with approval by the House Small Business Committee in its 1963 report following an investigation of the threatened application by the Federal Trade Commission of a *per se* rule to cooperative advertising by groups of independent retailers. H. R. Rep. No. 699, 88th Cong., 1st Sess. 14 (1963); 5 CCH TRADE REG. REP. ¶ 50,200 at 55,234.

[45] In the Brief Amicus Curiae filed by Serta Associates, Inc., et al, in the *White Motor* case, it is stated that Serta's stock is owned by its 36 mattress manufacturing licensees; that each licensee holds an exclusive territory for Serta-identified products; that the "main competitor of the Serta licensees is the Simmons Company, a nation-wide firm with 13 factories, 61 warehouses . . ." and that the second largest nationally integrated competitor is the Englander Company (pp. 5-6). It further states that these licensees first considered merging their businesses because national advertising had become a "competitive necessity" and that the licensing arrangement was designed "as a means of enabling the . . . regional licensees to remain in business and compete with . . . Simmons" (p. 7). This brief also states that since the Serta licensing program was initiated in 1931, "five other similar trademark licensing groups have been formed in the mattress industry" (p. 8). A case similar to the one at bar is pending against Serta (J.S. 3, n. 1).

considered. Indeed, under this rule, it might be effectually destroyed by judicial decree, and a monopoly created—all in the interest of labels, pigeonholes, and an easy, mechanical method of administering the Sherman Act—without the record ever showing the basic economic facts. Any such result would make a mockery of the maxim that the Sherman Act

> "[a]s a charter of freedom, . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions. . . . The restrictions the Act imposes are not mechanical or artificial. Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness."[46]

Since the territorial restrictions of the Sealy licenses are necessary to its survival (see pp. 10-11, *supra*), an order enjoining their use would tend to destroy the vigor of the inter-brand competition which Sealy assists its licensees to furnish to Simmons, Englander and other large bedding manufacturers. This would be without compensating public advantage, for the very intra-brand competition which the government seeks would substantially destroy the licensees' incentive to build sales and good will under the Sealy name. Contrary to principles previously stated by this Court, such an order would favor competitors with the "longest purse" and seriously cripple "smaller independents"[47]—the Sealy licensees.[48] To paraphrase a statement

---

[46] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933). See also White Motor Co. v. United States, 372 U.S. at 261: "*Standard Oil Co.* v. *United States*, 221 U.S. 1, 62, read into the Sherman Act the 'rule of reason' . . . [which] normally requires an ascertainment of the facts peculiar to the particular business."

[47] See United States v. Paramount Pictures, Inc., 334 U.S. 131, 164 (1948).

[48] See note 6, *supra*.

made by the Court in the *White Motor* case: the territorial restrictions in the Sealy licenses (together with the marketing services rendered by Sealy, which are financed by the royalties from its territorial licenses) provide "the only practicable means [these] small compan[ies] ha[ve] for breaking into or staying in business . . . and [they are] within the 'rule of reason'" (372 U.S. at 263). They are fully consistent with and tend to carry out not only the Sherman Act's main purpose to promote competition but the national policy favoring "'local control' over industry and the protection of small businesses" (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 316 (1962); see also *id.* at 346).[49]

V. The Special Circumstances of This Case Make Affirmance of the District Court's Judgment Particularly Appropriate

Although, in a case such as this, the Expediting Act provides that the losing party's "first and only appeal" shall be to this Court, plenary consideration is not necessary "if the question presented is plainly insubstantial or directly governed by a controlling decision of this court..." *Kennecott Copper Corp.* v. *United States,* 85 Sup. Ct. 1575 (June 1, 1965) (dissenting opinion), *affirming per curiam* 231 F.Supp. 95 (S.D.N.Y. 1964).[50] Under these principles,

---

[49] Significantly, the Lanham Act provision that a trademark may not be "'used to violate the antitrust laws of the United States'" (as noted at J.S. 10) was enacted not to hinder small businesses in their efforts to compete with giants, but to help them. Senator O'Mahoney stated (92 Cong. Rec. 7872-73): "There have been occasions . . . when trade-marks have been misused . . . used in connection with cartel agreements . . . used to restrain the trade and to the disadvantage of little business."

[50] *Cf.* United States v. National Malleable & Steel Castings Co., 358 U.S. 38 (1958), *affirming* 1957 Trade Reg. Rep. ¶ 68,890 (N.D.Ohio 1957).

we submit, the fact that the territorial feature of the Sealy licensing arrangements has previously been reviewed by the Federal Trade Commission[51] as well as by the district court in the case at bar, together with the fact that the same anti-territorialization arguments made here by the Antitrust Division were very recently submitted and rejected by this Court in *White Motor* (see pp. 20-24, *supra*), makes further consideration of this particular case unnecessary. Under the circumstances, the Court should not feel compelled to review the lengthy record herein, and Sealy should be spared the further expense and travail of a full scale appeal.

---

[51] Matter of Sealy, Inc., 45 F.T.C. 730 (1948).

CONCLUSION

For the reasons hereinabove set forth, "it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" (Rule 16, para. 1(c)), and the judgment of the district court should be affirmed.

Respectfully submitted,

JOHN T. CHADWELL
RICHARD W. MCLAREN
RICHARD S. RHODES
DAVID L. AUFDERSTRASSE
Attorneys for Sealy, Inc.

CHADWELL, KECK, KAYSER,
RUGGLES & MCLAREN
135 South LaSalle Street
Chicago 3, Illinois

JOSEPH F. HAAS
HAAS, HOLLAND, FREEMAN,
LEVISON & GIBERT
1116 First National Bank Bldg.
Atlanta 3, Georgia
Of Counsel

August 1, 1965